SUPREME COURT, U. S.

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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 1181

LESTER G. MADDOX, ET AL.,

Appellants

vs.

BEN W. FORTSON, JR., ET AL.,

Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

MOTION TO DISMISS OR AFFIRM

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Georgia and the other
named officials of The
Republican Party of Georgia

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Appellees, The Republican Party of Georgia and the other named officials of The Republican Party of Georgia move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of The Supreme Court of Georgia on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTION PRESENTED

Is Article V, Section I, Paragraph I of the 1945 Constitution of the State of Georgia which states that "The Governor serving at the time of the adoption of this Constitution and future governors shall not be eligible to succeed themselves and shall not be eligible to hold office until after the expiration of four years from the conclusion of his term of office", violative of the provisions of either the First Amendment or the Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

I.

NO PROVISION OF THE UNITED STATES CONSTITUTION OR ANY OF ITS AMENDMENTS EXPRESSLY OR IMPLIEDLY DICTATES THE METHOD A STATE MUST USE TO SELECT ITS GOVERNOR. *FORTSON v. MORRIS*, 385 U.S. 231 (1966).

"It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers, the tenure of their offices, the manner of their election, and the grounds on which, the tribunals before which, and the mode in which, such elections may be contested, should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." *Taylor and Marshall v. Beckham*, 178 U.S. 548, pp. 570-1 (1899).

"In its internal administration the State . . . has entire freedom of choice as to the creation of an office for pure-

ly state purposes and the terms upon which it should be held by the person filling the office." *Wilson v. North Carolina,* 169 U.S. 586, p. 594 (1897).

The right to be protected and guaranteed by the Fourteenth Amendment of the United States Constitution is itself subject to the imposition of state standards which do not contravene any standards which Congress has imposed. *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966). Obvious examples of factors which a state might take into account when determining the qualifications of voters are residence qualifications, age and previous criminal records. *Lassiter v. North Hampton City Board of Elections,* 360 U.S. 45 (1945).

II.

A DIFFERENTIATION IS NOT NECESSARILY A DISCRIMINATION. *CROXTON v. OKLAHOMA*, 186 Okla. 249, 97 P.2d 11.

The rule is well settled that a State may classify persons and objects for the purpose of legislation, and as a matter of fact, all legislation necessarily involves some classification. *District of Columbia v. Brooke,* 214 U.S. 138 (1908). It is class legislation discriminating against some and favoring others that is prohibited by the Equal Protection Clause of the Fourteenth Amendment; *Douglas v. California,* 372 U.S. 353 (1963). This protection does not prohibit or prevent classification provided such classification of persons and things is reasonable, based on proper and justiciable distinctions and is not a subterfuge to shield one class or unduly burden another. *Morey v. Doud,* 354 U.S. 457 (1957).

III.

IT IS INVIDIOUS DISCRIMINATION THAT IS PROHIBITED.

In *Williams v. Rhodes*, 393 U.S. 23 (1968) at p. 30, the Court held:

> "It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we have also held many times that 'invidious' distinctions cannot be enacted without a violation of the Equal Protection Clause. In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."

Under the test laid down in *Williams v. Rhodes, supra*, the provision of Article V, Section I, Paragraph I of the 1945 Constitution of the State of Georgia is not violative of the Equal Protection Clause.

IV.

THERE IS A COMPELLING STATE INTEREST IN THE OFFICE OF THE GOVERNOR SUCH AS TO JUSTIFY PLACING THAT HIGH OFFICE IN A CLASS BY ITSELF AND ENACTING LEGISLATION MAKING AN INCUMBENT GOVERNOR INELIGIBLE TO SUCCEED HIMSELF.

There are many sound, rational, non-discriminatory and compelling reasons as to why an incumbent Governor of Georgia should not be allowed to succeed himself. If

such an incumbent Governor were planning to run for re-election, his decisions in the latter portion of his term could be politically oriented instead of in the general interest of the people of the state. Closely aligned to this, is the objection that were it not for Article V, Section I, Paragraph I of the 1945 Constitution of Georgia, an incumbent Governor could engage in "politicking" during his term and, therefore, not effectively attend to the duties of his office. Appellants take the position that in this era of rapid transportation and communication, the governor can indeed do both at the same time. Since the Governor is the number one public servant of the State and since he is entrusted with more power, duty, and responsibility than any other public servant, it is not at all unreasonable to expect, and, in fact, demand, that the Governor give all of his time and effort to the people. To suggest that he give anything less would render him incapable of fully and adequately performing his job.

Another and more compelling state interest is the prohibition of the development of a strong political machine through the top office of the state. An incumbent governor by name and reputation alone would have a decided advantage over any opponent; however, the other uses to which the office could be put in a political campaign are compelling enough reasons to justify the provision in question.

The appellants state that the fear of tenure by an unresponsive or corrupt official was swept away by the "one man, one vote" rule of *Gray v. Sanders*, 372 U.S. 368 (1963). The appellants assert that we are now in a new and modern era and that the anti-succession law in question is archaic and outmoded. If that be the case, why did thirty-six states ratify the Twenty-Second Amend-

ment to the United States Constitution in 1951 limiting the President of the United States to two successive terms of office and why did the Georgia Constitutional Revision Committee of 1969 recommend that there be included in the new Constitution a limitation to the effect that, "the Governor shall not be eligible to succeed himself and shall not be eligible to hold such office until after the expiration of four years from the conclusion of his term of office"? *(Article IV, Section I, Paragraph II of the proposed Constitution submitted to the 1970 session of the General Assembly of Georgia by the Georgia Constitutional Revision Committee of 1969)*. It is also interesting to note that the anti-succession provision which is at issue in the case at bar, became a part of the Constitution of Georgia in 1941. It is respectfully submitted that Article V, Section I, Paragraph I is not archaic and outmoded, but, up-to-date, modern, and in keeping with the desires of the people and is of such compelling state interest to be justified. *NAACP v. Button*, 371 U.S. 415 (1963).

V.

VOTERS DO NOT HAVE AN ABSOLUTE RIGHT TO VOTE FOR WHOMEVER THEY PLEASE.

In *Gray v. Sanders*, 372 U.S. 368, 379 (1963), the Court held that "all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in the geographical area. This is required by the Equal Protection Clause of the Fourteenth Amendment."

In *Harper v. Virginia Board of Elections*, 383 U.S. 663

(1966), the Court said that a state violated the Equal Protection Clause of the Fourteenth Amendment whenever it made the affluence of the voter or payment of a tax an electoral standard holding at p. 666 that "voter qualifications have no relation to wealth. . .". Thus, we see that what is protected is the equal right along with all other voters to cast one's ballot, not the absolute right to vote for the candidate of one's choice regardless of his qualifications or the state's laws in that regard. *Harper v. Virginia Board of Elections,* supra, at p. 664.

In *Fortson v. Morris,* 385 U.S. 231 (1966), this Court held that the State of Georgia by its Constitution would limit the rights of the voters to the extent of taking the Governor's race away from the people and allowing the Legislature to choose the Governor in a given situation. Thus, the right of a person to vote for the candidate of his choice is not absolute. This is not a "voting rights" case, but involves only the qualifications of a candidate for office.

VI.

NO AUTHORITY.

Neither *Williams v. Rhodes,* 393 U.S. 23 (1968), holding that the Equal Protection Clause was violated by the Ohio election laws which made it virtually impossible for any party except the Republican or Democratic Party to qualify on the ballot, *Kramer v. Union Free School District,* 395 U.S. 621 (1969), prohibiting unjustified discrimination in disfranchising certain residents in school district elections, *Shapiro v. Thompson,* 394 U.S. 618 (1969), nor any other case cited by appellants stands for the proposition that the State cannot impose on the Governor a limitation on succeeding himself.

CONCLUSION

Wherefore, this Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial as not to need further argument, and, this Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by The Supreme Court of Georgia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, WILLIAM C. O'KELLEY, attorney for The Republican Party of Georgia and other named officials of The Republican Party of Georgia, one of the appellees herein, and as a member of the Bar of The Supreme Court of The United States, hereby certify that on the 19th day of February, 1970, I served copies of the foregoing MOTION TO DISMISS OR AFFIRM on the several parties thereto by depositing the same in a United States Post Office or mailbox, with first class postage prepaid, addressed to counsel of record at their proper post office addresses, to wit:

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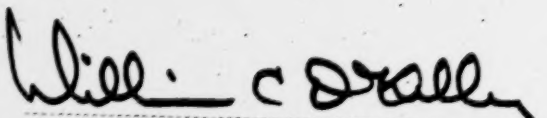
I further certify that all parties required to be served have been served.



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